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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
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Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
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**OPPOSITION OF VANGUARD CELLULAR SYSTEMS, INC.
TO JOINT MOTION FOR STAY PENDING JUDICIAL REVIEW**

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its Opposition to the Joint Motion filed by GTE Corporation ("GTE") and The Southern New England Telephone Company ("SNET") to stay the effectiveness of Federal Communications Commission's (the "Commission") recently adopted local exchange interconnection rules.[1/] Vanguard opposes the *Stay Request* because a stay would perpetuate existing anti-competitive interconnection practices that have plagued the wireless industry for the last decade, and which were to be eradicated by the passage of the Telecommunications Act of 1996.[2/]

I. INTRODUCTION

Vanguard is a long-time provider of cellular service, and currently serves more than 450,000 customers in the eastern half of the United States. Vanguard entered the cellular

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1/ *See Joint Motion of GTE Corporation and The Southern New England Telephone Company For Stay Pending Judicial Review*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (filed August 28, 1996) (*"Stay Request"*); *First Report and Order*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98, CC Docket No. 95-185 (adopted August 1, 1996, released August 8, 1996) (*"First Report and Order"*).

2/ *See* The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *to be codified at* 47 U.S.C. § 151 *et seq.* (the "1996 Act").

marketplace in 1984 and now is one of the 20 largest cellular carriers in the country. As a provider of wireless service, Vanguard has a vital interest in the manner in which it is permitted to interconnect to the local exchange, and the costs of such interconnection.

Vanguard has been an active participant in the Commission's recent proceedings to implement the Telecommunications Act of 1996. Vanguard filed comments and reply comments in this docket to address directly the Commission's role in setting national standards for interconnection to Bell Operating Company ("BOC") facilities.[3/] Indeed, the Commission's new rules for interconnection are a significant advancement in opening the local exchange to competition and ending anti-competitive pricing practices that have prevented cellular and other wireless technologies from becoming cost-effective competitors to the BOCs and other local exchange service providers.

It is this very same competition that has led GTE and SNET to file this *Stay Request* in a blatant attempt to maintain their traditional monopolies. Vanguard, therefore, opposes grant of the pending *Stay Request* based upon the interpretation of Sections 251 and 252 of the 1996 Act contained therein, the authority vested in the Commission under Section 332 of the Omnibus Budget Reconciliation Act of 1993,[4/] and the extent to which GTE and SNET have failed to satisfy the considerable legal showing required for grant of a stay under established Commission

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3/ *See* Comments of Vanguard Cellular Systems, Inc., CC Docket No. 96-98 (filed May 16, 1996); Reply Comments of Vanguard Cellular Systems, Inc., CC Docket No. 96-98 (filed May 30, 1996).

4/ *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103, 107 Stat. 312, 393 (1993) ("Budget Act").

and court precedent.[5/] While this opposition is limited to certain specific elements of the *Stay Request*, Vanguard submits that, in fact, the *Stay Request* meets none of the criteria for a stay.

II. PURSUANT TO EXPRESS STATUTORY MANDATE, THE COMMISSION HAS THE AUTHORITY TO ADOPT NATIONAL PRICING STANDARDS TO GOVERN CMRS INTERCONNECTION TO THE LOCAL EXCHANGE.

In their attempt to derail Commission implementation of Congress' pro-competitive mandates, GTE and SNET argue that the Commission lacks jurisdiction to adopt pricing standards for interconnection to the local exchange. They argue that interconnection of intrastate traffic is subject only to state regulation and that the Commission lacks authority to adopt national interconnection and pricing guidelines to govern both interstate and intrastate interconnection.[6/] Simply put, their interpretation of the Commission's statutory mandate, and its authority over all interconnection to the local exchange, is wrong.

A. Sections 251 and 252 of the 1996 Act

The explicit language of the interconnection and arbitration provisions of Sections 251 and 252 of the 1996 Act, as well as the preemption authority granted to the Commission under Section 253 of the 1996 Act, evidences the Commission's authority to adopt a national framework for all interconnection. Section 251(c) of the 1996 Act imposes on all incumbent local exchange carriers the obligation to provide interconnection "on rates, terms and conditions

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5/ A party moving for a stay must satisfy each of the following elements: (1) a strong and substantial showing of the likelihood of success on the merits; (2) irreparable harm in the absence of a stay; (3) issuance of a stay will not harm other interested parties; and (4) grant of a stay will serve the public interest. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 924 (D.C. Cir. 1958).

6/ *See Stay Request* at 3.

that are just, reasonable, and non-discriminatory . . . ."[7/] Concurrent with the imposition of this obligation, Congress vested *in the Commission* the obligation to promulgate regulations "to implement the requirements of this section" and to preempt state authority that is inconsistent with the requirements and purposes of Section 251.[8/]

Furthermore, Section 252 expressly admonishes the states to conform their arbitrations to "the regulations prescribed by the Commission pursuant to Section 251."[9/] This explicit reference to the Commission's regulations implementing Section § 251 in the pricing provisions of Section 252 provides further evidence that Congress intended that the Commission define pricing requirements for the interconnection of both interstate and intrastate traffic. Indeed, there is no other way to read the statute.

B. Section 332 of the Budget Act

Independent of Section 251, the Commission has the power to adopt pricing guidelines for interconnection between LECs and CMRS providers under Section 332 of the 1993 Budget Act.[10/] As the *First Report and Order* correctly observes, "[S]ection 332 in tandem with Section 201 is a basis for jurisdiction over LEC-CMRS interconnection . . . ."[11/] This jurisdiction not only empowers the Commission to adopt initial interconnection policies, including pricing

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7/ *See* 47 U.S.C. § 251(c)(3).

8/ *See* 47 U.S.C. §§ 251(d)(1), 253(d), 251(d)(3)(C).

9/ *See* 47 U.S.C. § 252(c)(1).

10/ Curiously, GTE and SNET seek stay of the *First Report and Order* as it was adopted in CC Docket No. 96-98, the landline interconnection proceeding, and not in CC Docket No. 96-185, the CMRS interconnection proceeding. This decision ignores the plenary authority over CMRS-LEC interconnection issues held by the Commission since 1993. *See* 47 U.S.C. § 332.

11/ *See First Report and Order* at ¶ 1023.

standards for such interconnection, but also permits the Commission to alter its LEC-CMRS interconnection policies, including the relevant pricing standards for such interconnection, in the future, pursuant to Section 332 of the Communications Act.

Conveniently, the *Stay Request*, while relying on Section 2(b) of the Communications Act to support its Section 251 claims, ignores the significant impact the 1993 Budget Act had on the regulation of CMRS. Although Section 2(b) traditionally reserves to the states authority over "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service," Congress in the Budget Act altered FCC authority by excepting CMRS from Section 2(b)'s jurisdictional limitations.[12/] By so doing, Congress made clear that the federal-state dichotomy that "fenced off" intrastate matters from federal jurisdiction would no longer apply to CMRS.

The express terms of Section 332(c)(1)(B) confirm that CMRS has been reclassified as an interstate service. Indeed, the statutory framework established in Section 332, as amended by the Budget Act, grants the FCC authority to regulate all aspects of CMRS, including pricing standards for LEC-to-CMRS interconnection. Section 332(c)(1)(B) makes plain that the FCC's authority under Section 201 is expanded to include authority to act in response to any CMRS provider's request for interconnection with any carrier, including carriers providing intrastate services.[13/] Further, pursuant to section 201(b), the FCC expressly is authorized to regulate

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12/ *See* 47 U.S.C. § 152(b) ("Except as provided by . . . section 332 . . . , nothing in this Act shall be constructed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ."). The amendment to Section 2(b) was intended to clarify that the "Commission has the authority to regulate commercial mobile services." *See* Conf. Rep. No. 103-213, 103 Cong., 1st Sess. 494, 497 (1993).

13/ Section 332(c)(1)(B) states that:

interconnection charges to ensure that the rates charged for interconnection are just and reasonable.[14/] Thus, by amending section 152(b) and adding 332(c)(1)(B) to the Communications Act, Congress evidenced an intent to expand the FCC's authority over LEC-to-CMRS interconnection to match its regulatory authority over interstate communications.[15/]

Accordingly, regardless of the merits of GTE's and SNET's claims regarding the application of Section 251 and 252 to wireline interconnection, it is plain that the Commission is authorized to establish pricing standards for CMRS interconnection to incumbent LEC facilities. Consequently, GTE and SNET have failed to establish a likelihood of success on the merits of their pending stay request.

III. A STAY OF THE COMMISSION'S PRO-COMPETITIVE RULES WILL SIGNIFICANTLY HARM PROSPECTIVE INTERCONNECTORS TO THE LOCAL LOOP.

As part of their *Stay Request*, GTE and SNET argue that other parties will not be adversely impacted by grant of their request because: (1) private negotiations between carriers

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> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

Significantly, this provision does not distinguish between the FCC's authority to mandate the terms of interconnection for the provision of "intrastate" or "interstate" CMRS. Consequently, the FCC is granted authority to order *all* common carriers to establish physical connections with CMRS providers upon request, regardless of the intrastate or interstate nature of the carriers' service offerings.

14/ *See* 47 U.S.C. § 201(b) ("All *charges*, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such *charge*, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . .") (emphasis added).

15/ *See* 47 U.S.C. § 152(a).

can proceed, pursuant to Section 252 of the 1996 Act; and (2) agreements can be revised if the rules are upheld.[16/] This claim is both inaccurate and patently disingenuous. In many significant ways, grant of the requested relief will place Vanguard and similarly situated interconnectors at a competitive disadvantage in the interconnection negotiation process. It also will undermine the pro-competitive initiatives ordained by Congress, and embodied in the *First Report and Order*, and will perpetuate the interconnection abuses the 1996 Act was intended to correct.

Fundamentally, GTE and SNET fail to recognize that the exact harms they claim if a stay is not granted will befall potential interconnectors if a stay is granted. In this crucial, short period following the adoption of the *First Report and Order*, many agreements will be negotiated and many arbitrations will be completed.[17/] The burden on non-ILECs of operating during this time without the Commission's new rules would be at least as great (and most likely greater) than any potential impact on GTE, SNET and their brethren of operating under the rules.

Relieving GTE, SNET and all other incumbent LECs from the limitations placed on their ability to elicit monopoly profits from potential interconnectors will undermine the substantial efforts of Congress and the Commission to correct the injustices that have continued to permeate the interconnection negotiate process, and that have resulted in consistently inflated interconnection charges for the past ten years. Since the passage of the 1996 Act, it has been the Commission's goal to establish a framework for interconnection negotiation that would result in cost-based interconnection rates and non-discriminatory treatment of all interconnectors to the

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16/ *See Stay Request* at 35-38.

17/ Indeed, since adoption of the rules, Vanguard has requested negotiation with 16 of its interconnecting LECs and Vanguard has scheduled several sessions to negotiate interconnection agreements with those LECs. It is likely that the entire initial negotiation period for these requests, and possibly the arbitration period as well, would be completed before the stay could be lifted.

local exchange. Staying the effectiveness of the *First Report and Order* will obviate the progress made over the last seven months to ensure that interconnectors are not forced into interconnection agreements that stifle their ability to compete directly with LECs. In fact, grant of the stay will again place interconnectors at the mercy of monopolists that wield enormous bargaining power over service providers dependent on interconnection to conduct their business.[18/]

Contrary to the assertions of GTE and SNET, the absence of these critical rules will affect interconnection negotiations in a way that will return the process, and its outcomes, to the unacceptable results of the pre-1996 Act period. Despite the failure of any non-incumbent carrier to negotiate cost-based interconnection agreements in the past ten years, GTE and SNET would have the Commission extend these failures to the Section 252 negotiation process. Indeed, rather than taking "a host of issues off the bargaining table,"[19/] the new rules merely restrict the LECs' ability to leverage their monopoly power to impose anti-competitive and discriminatory rates on potential interconnectors (as they consistently have done in the past).[20/]

In addition to disadvantaging Vanguard immediately in the negotiation process, grant of the stay will result in a permanent loss of revenue that cannot adequately be recouped in the

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18/ Without the limitations placed on incumbent LECs by the new interconnection rules, incumbent LECS again will be empowered to impose interconnection rates on potential competitors that already have been determined to be illegal. Indeed, what GTE and SNET seek, in essence, is to be relieved from limitations that are supported by the vast record accumulated in two Commission proceedings, and that directly implement the statutory mandate of Congress.

19/ *See Stay Request* at 25. Of course, nothing in the rules prevents GTE or SNET from taking any position or seeking any particular outcome in negotiations.

20/ For that reason, Vanguard's requests for negotiation were premised on the new rules. Without the pro-competitive support of the new interconnection rules to level the playing field, Vanguard will be no better equipped to negotiate cost-based terms than it was before the Commission initiated its wireline and CMRS interconnection proceedings several months ago.

future. Indeed, the rubric within which interconnection negotiations will take place will dictate terms of interconnection, including prices, that cannot easily be changed.[21/] The harm caused to new competitors will be significant if they are forced to incur inflated interconnection costs throughout the term of the appeal, and then be forced to renegotiate terms when the new rules are upheld.[22/] Absent any showing that GTE and SNET are likely to succeed on the merits of their case, and in the face of substantial record support for the decisions made in the *First Report and Order*, it would be irresponsible for the Commission to grant GTE's and SNET's requested relief.

Finally, the impact of the grant of the stay is much broader than suggested in GTE and SNET's *Stay Request*. Not only would the stay relieve the companies of their obligation to provide interconnection at cost, but it would relieve the companies of honoring their obligations to provide for reciprocal compensation for the exchange of traffic. As recognized in the CMRS Notice of Proposed Rulemaking, incumbent LECs consistently have denied wireless carriers the benefits of reciprocal competition of the termination of LEC traffic on the interconnectors' networks.[23/] Consequently, the *First Report and Order* requires that reciprocal compensation immediately be afforded to CMRS providers. A stay, however, would perpetuate the existing

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21/ As recognized by GTE and SNET, once interconnection agreements are in place, companies will structure their business plans around those agreements. Once this occurs, it may be impossible to return to "square one" to correct the injustices invited upon potential competitors by the absence of the Commission's pro-competitive interconnection rules. *See generally Stay Request* at 29-30.

22/ Moreover, retroactive relief will not necessarily be available to potential competitors to compensate them for the considerable economic harm incurred during the pendency of the stay and appeal process. Contrary to GTE and SNET's assertions, the "brief period required for expedited review in the Court of Appeals" can extend over many months, during which potential interconnectors will be deprived their statutory interconnection rights. *See Stay Request* at 30 and 37.

23/ *See Notice of Proposed Rulemaking*, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185 at ¶ 40 (released January 11, 1996).

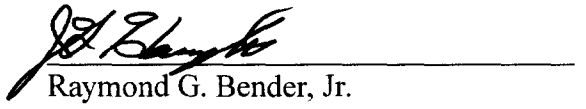
windfall gained by GTE, SNET and other LECs that do not provide reciprocal compensation and would permit them to continue their other anti-competitive interconnection practices.[24/] Simply put, grant of the stay would injure many others by inhibiting their ability to compete with incumbent LECs and depriving them of the benefits offered by the pro-competitive policies adopted by the Commission in the *First Report and Order*.

IV. CONCLUSION

For the foregoing reasons, Vanguard Cellular Systems, Inc. urges the Commission to deny the *Stay Request* submitted by GTE and SNET on August 28, 1996.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.



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24/ *See Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 6 FCC Rcd 4827 (Com. Car. Bur. 1991) (denying stay request because it would "harm the public interest because cellular licensees engaged in discriminatory practices against resellers arguably could continue those practices, in contravention" of Commission requirements), *aff'd on recon.*, 7 FCC Rcd 4006 (1992); *see also Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106 (D.C. Cir. 1992).

CERTIFICATE OF SERVICE

I, V. Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, do hereby certify that on this 4th day of September, 1996, a copy of the foregoing "Opposition of Vanguard Cellular Systems, Inc. To Joint Motion for Stay Pending Judicial Review" was sent via first-class mail, postage prepaid, to the following:

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